

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

B. KLEAN II, INC.

COMPLAINANT

VS.

SPANISH COVE SANITATION

DEFENDANT

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) CASE NO. 94-346
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O R D E R

Complainant seeks to recover amounts billed and collected for sewer service in excess of Defendant's filed rates. Its complaint poses the following question: May a utility charge a rate for service which is set forth in a contract with a utility customer but which has not been filed with the Commission? Finding in the negative, the Commission orders Defendant to refund to Complainant all amounts charged in excess of its filed rates.

Spanish Cove Sanitation, Incorporated ("Spanish Cove Sanitation") is a sewer utility which serves approximately 228 customers in the Spanish Cove Subdivision of Jefferson County, Kentucky. Approximately seven of its customers are commercial establishments.

In 1982 the Commission established Spanish Cove Sanitation's present rates.¹ It authorized Spanish Cove Sanitation to assess

¹ Case No. 8487, Adjustment of Rates of Spanish Cove Sanitation, Inc. (August 12, 1982).

its commercial customers a monthly rate of \$32.00 for each unit within a commercial development. On February 15, 1983, Spanish Cove Sanitation filed a rate schedule with the Commission which reflects these rates.² No revision nor amendment to this rate schedule has been filed with the Commission.

On February 15, 1985, John Lawson, Spanish Cove Sanitation's president and sole shareholder, entered an agreement with Stanley F. Lipton, George T. Underhill, Jr., Jeff Underhill, and George Todd Underhill III (collectively "Lessors"), to lease space at a commercial shopping center for a coin laundromat. The leased space, whose address is 5402 Delmaria Way, is located in or near the Spanish Cove Subdivision and is connected to Spanish Cove Sanitation's sewage treatment facilities. The Lease Agreement required the Lessors to pay a monthly rate of \$150.00 to Spanish Cove Sanitation for sewer service.³

On March 16, 1993, the Lessors, as part of an asset purchase agreement, transferred the Lease Agreement to B. Klean II, Inc. ("Complainant").⁴ The Complainant assumed responsibility for complying with the Lease Agreement's terms and paying all sewer service bills. Since June 1993 Spanish Cove Sanitation has billed

² B. Klean II, Inc.'s Motion for Summary Judgment, Exhibit 1.

³ Spanish Cove Sanitation's Brief and Response to Motion for Summary Judgment, Exhibit A. The Commission notes that Spanish Cove Sanitation is not a party to the Lease Agreement. Mr. Lawson executed the Lease Agreement in his individual capacity, not as an agent or official of Spanish Cove Sanitation. The record contains no evidence that Mr. Lawson assigned this Lease Agreement to the sewer utility.

⁴ B. Klean II, Inc.'s Motion for Summary Judgment, Exhibit 3.

the Complainant, and the Complainant has paid, \$150.00 monthly for sanitary sewer service.

On August 31, 1994, the Complainant⁶ brought a complaint against Spanish Cove Sanitation in which it alleges that the sewer utility is charging a rate in excess of its filed rates. It seeks a refund of all amounts paid in excess of the filed rate. It further requests that Spanish Cove Sanitation be prohibited from charging and collecting any rate other than its filed rate.

Spanish Cove Sanitation concedes that the rate charged to the Complainant is not in its filed rate schedule and has never been submitted for Commission review. The sewer utility contends that the rate which it currently charges is a reasonable rate and the product of careful negotiations. It further asserts that, as a result of the utility's reliance upon the representations of a Commission employee, the Commission is estopped from altering the Lease Agreement's rate.

KRS 278.160 requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). It further states:

No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed

⁶ Glenn Hogan, president of B. Klean II, Inc., originally brought the Complaint. On February 10, 1995, the Commission permitted the substitution of B. Klean II, Inc. as Complainant.

schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).⁶ A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

The principal effect of KRS 278.160 is to bestow upon a utility's filed rate schedule the status of law. "The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation . . . of . . . rates takes that subject out of the realm of ordinary quasi-statutory enactment." New York N.H. & H.R. Co. v. York & Whitney Co., 102 N.E. 366, 368 (Mass. 1913). While a utility may file or publish new rate schedules to change its rates pursuant to KRS 278.180, it lacks the legal authority to deviate from its filed

⁶ See also, Haverhill Gas Co. v. Findlen, 258 N.E.2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957).

rate schedule. It "can claim no rate as a legal right that is other than the filed rate." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

This inflexibility is, in part, the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989).

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which the agency has been made cognizant." City of Cleveland, Ohio v. Fed. Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). Filed rates have been reviewed and found reasonable by the Commission. Prior to becoming effective, they are examined and questioned. This scrutiny is the principal reason for the Commission's existence.

In the case at bar, the rate which Spanish Cove Sanitation currently charges to Complainant is in excess of its filed rate schedule and the utility's assessment and collection of that rate

violates KRS 278.160. See GTE North Incorporated v. Pub. Serv. Comm'n of Wisconsin, 500 N.W.2d 284, 289 (Wisc. 1993) ("the receipt of compensation by a utility that is either greater or lesser than the filed rate is an unlawful act").

While Commission Regulation 807 KAR 5:011, Section 13, permits a utility to enter contracts "governing utility service which set out rates, charges or conditions of service not included in its general tariff," it expressly requires that these contracts be filed with the Commission. Spanish Cove Sanitation never entered a special contract with Complainant or Complainant's predecessors nor did the utility file such contract with the Commission.

Asserting the defenses of equitable estoppel and waiver, Spanish Cove Sanitation states that Mr. Lawson advised the Commission of the Lease Agreement's existence in 1985 and that a Commission official advised him that no further action on the utility's part was required.⁷ It argues that, in light of its detrimental reliance upon this official's representation, the Commission is estopped from denying the legality of the Lease Agreement's rate and has waived any right to enforce KRS 278.160 and Commission Regulation 807 KAR 5:011.

This argument is not persuasive.⁸ First, Mr. Lawson's statement is not credible. The record contains no evidence to

⁷ Spanish Cove Sanitation's Brief and Response to Motion for Summary Judgment, Exhibit A.

⁸ Complainant has moved to strike this affidavit which was attached as an exhibit to Spanish Cove Sanitation's Brief. Finding that Complainant's arguments go to the weight of the evidence, the Commission denies the motion.

corroborate his allegations. Spanish Cove Sanitation witness Michelle Mingus testified that a search of the utility's records had indicated no correspondence or communication with the Commission on this issue.⁹ There is no evidence in the record that the utility made any effort to secure the testimony of the Commission official who allegedly gave the incorrect advice.

Assuming arguendo that such representations were made, Spanish Cove Sanitation's reliance upon them was not reasonable. The Commission "acts and speaks only through its written orders." Union Light, Heat & Power Co. v. Pub. Serv. Comm'n, Ky., 271 S.W.2d 361 (1954). The oral opinions of a Commission official cannot be considered as written orders. See Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., Ky., 334 S.W.2d 765 (1960). Moreover, the clear and unequivocal language of KRS 278.160 and Commission Regulation 807 KAR 5:011, Section 13, makes any reliance on this official's alleged opinion unreasonable.

Spanish Cove Sanitation also argues that no refund should be ordered since the Lease Agreement rate is reasonable. It asserts that, as the Complainant is producing two hundred times the wastewater of an average residential user and as its wastewater contains a much heavier organic load, a different rate is necessary.

The record, however, is devoid of any evidence to demonstrate the reasonableness of the Lease Agreement rate. Even if such

⁹ T.E. at 21.

evidence were present, this argument merely begs the central question. KRS 278.160 requires Spanish Cove Sanitation to assess only its filed rates. The Lease Agreement rate is not filed with the Commission.

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. On August 12, 1982, the Commission established Spanish Cove Sanitation's present rates.

2. On February 15, 1983, Spanish Cove Sanitation filed a rate schedule with the Commission which reflects these rates.

3. Spanish Cove Sanitation's filed rate schedule provides for a monthly rate for commercial customers of \$32.00 for each unit within a commercial development.

4. Since February 15, 1983, Spanish Cove Sanitation has not amended nor revised its rates for sewer service.

5. On February 15, 1985, John Lawson entered into a Lease Agreement with the Lessors to lease one unit at a commercial shopping center for a coin laundromat.

6. Spanish Cove Sanitation provides sewer service to this commercial shopping center.

7. The Lease Agreement provides that the Lessors pay a monthly rate of \$150.00 to Spanish Cove Sanitation, Inc. for sewer service to this commercial unit.

8. Spanish Cove Sanitation has not filed the Lease Agreement with the Commission.

9. On March 16, 1993, the Lessors transferred the Lease Agreement to B. Klean II, Inc.

10. Since June 1, 1993, Spanish Cove Sanitation has billed B. Klean II, Inc. \$150.00 monthly for sewer service.

11. Pursuant to the rates in its filed rate schedule, Spanish Cove Sanitation lawfully could only charge to and collect from B. Klean II, Inc. a monthly rate of \$32.00.

12. Between June 1, 1993 and July 31, 1995, Spanish Cove Sanitation unlawfully billed and collected from B. Klean II, Inc. \$3,068 in excess charges.¹⁰

IT IS THEREFORE ORDERED that:

1. Complainant's Motion to Strike Defendant's Brief is denied.

2. Complainant's Motion for Summary Judgment is moot.¹¹

3. Spanish Cove Sanitation shall, within 30 days of the date of this Order, refund to Complainant by certified check or money order the sum of \$3,068 for charges unlawfully billed and collected from June 1, 1993 to the present.

4. Spanish Cove Sanitation shall, within 10 days of its refund to Complainant, furnish to the Commission documentary proof that the refund has occurred.

¹⁰ (\$150.00 - \$32.00) x 26 months = \$3,068.


¹¹ Prior to the hearing in this matter, Complainant moved for summary judgment. The Commission deferred ruling on this motion and continued with the evidentiary hearing. As a result, Complainant's motion was rendered moot.

5. Spanish Cove Sanitation shall immediately cease charging the Complainant any rate other than that specified in its filed rate schedule.

Done at Frankfort, Kentucky, this 18th day of September, 1995.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director